

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1195

To be argued by
JOHN P. FLANNERY, II

B
PJS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1195

UNITED STATES OF AMERICA,

Appellant,

—v.—

ANTONIO FLORES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JOHN P. FLANNERY, II,
FREDERICK T. DAVIS,
LAWRENCE R. PEDOWITZ,
*Assistant United States Attorneys,
Of Counsel.*

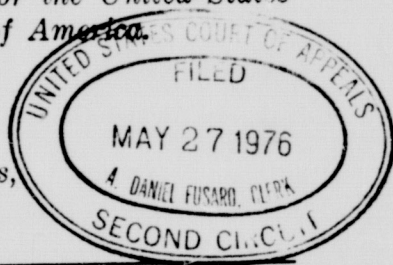


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
A. Factual Description of the Conspiracy	3
B. Extradition proceedings in Spain	6
C. Proceedings in the Southern District of New York	7
ARGUMENT:	
POINT I—There is clear statutory authority for the Government's Appeal from the trial judge's pre- trial decision to exclude evidence	12
POINT II—The district judge erred in ruling that much of conspiratorial activity which preceded the effective date of the Geneva Convention would have to be excluded	14
A. The Geneva Convention does not require the exclusion of any evidence, nor does the deci- sion of the Spanish Court	14
B. United States law clearly permits proof of the conspiracy in its entirety	20
C. Conclusion	24
CONCLUSION	25

TABLE OF CASES

<i>Burgess v. Salmon</i> , 97 U.S. 381 (1878)	21
<i>Calder v. Bull</i> , 3 U.S. (3 Dall.) 385 (1798)	21
<i>Christianson v. United States</i> , 226 F.2d 646 (8th Cir. 1955), <i>cert. denied</i> , 350 U.S. 994 (1956)	22

	PAGE
<i>Collins v. Loisel</i> , 259 U.S. 309 (1922)	19
<i>Ex parte Garland</i> , 71 U.S. (4 Wall.) 333 (1867) . . .	21
<i>Factor v. Laubenheimer</i> , 290 U.S. 276 (1933)	14
<i>Fiocconi v. Attorney General of the United States</i> , 462 F.2d 475 (2d Cir.), cert. denied, 409 U.S. 1059 (1972)	15
<i>Gallina v. Fraser</i> , 278 F.2d 77 (2d Cir.), cert. denied, 364 U.S. 851 (1960)	19
<i>Green v. United States</i> , 154 F. 401 (5th Cir.), cert. denied, 207 U.S. 596 (1907)	15
<i>Grunewald v. United States</i> , 353 U.S. 391 (1957) . .	23
<i>Holmes v. Laird</i> , 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972)	19
<i>In re Ryan</i> , 360 F. Supp. 270 (S.D.N.Y.), aff'd with- out opinion, 478 F.2d 1397 (2d Cir. 1973)	19
<i>Neeley v. Henkel</i> , 180 U.S. 109 (1901)	19
<i>Nixon v. Sirica</i> , 487 F.2d 700 (D.C. Cir. 1973) (en banc)	13
<i>Shapiro v. Ferrandina</i> , 478 F.2d 894 (2d Cir. 1973), cert. dismissed, 414 U.S. 884 (1973)	18, 19
<i>United States ex rel. Bloomfield v. Gengler</i> , 507 F.2d 925 (2d Cir. 1974)	19
<i>United States v. Barbera</i> , 514 F.2d 294 (2d Cir. 1975)	13
<i>United States v. Battisti</i> , 486 F.2d 961 (6th Cir. 1973)	13
<i>United States v. Binder</i> , 453 F.2d 805 (2d Cir. 1971), cert. denied, 407 U.S. 920 (1972)	21, 22
<i>United States v. Borelli</i> , 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965)	23

	PAGE
<i>United States v. Calandra</i> , 455 F.2d 750 (6th Cir. 1972), <i>reversed on other grounds</i> , 414 U.S. 338 (1974)	13
<i>United States v. Cannone</i> , 528 F.2d 296 (2d Cir. 1975)	13
<i>United States v. Colasurdo</i> , 453 F.2d 585 (2d Cir. 1971), <i>cert. denied</i> , 406 U.S. 917 (1972)	23
<i>United States v. Ferrara</i> , 458 F.2d 868 (2d Cir.), <i>cert. denied</i> , 408 U.S. 931 (1972)	21, 22
<i>United States v. Fino</i> , 478 F.2d 35 (2d Cir. 1973), <i>cert. denied</i> , 417 U.S. 918 (1974)	21, 22
<i>United States v. Geaney</i> , 417 F.2d 1116 (2d Cir. 1969), <i>cert. denied sub. nom. Lynch v. United States</i> , 397 U.S. 1028 (1970)	21
<i>United States v. Hysolion</i> , 439 F.2d 274 (2d Cir. 1971)	5
<i>United States v. Natale</i> , 526 F.2d 1160 (2d Cir. 1975)	23
<i>United States v. Nathan</i> , 476 F.2d 456 (2d Cir. 1973), <i>cert. denied</i> , 414 U.S. 823 (1973)	23
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir.), <i>cert. denied</i> , 421 U.S. 950 (1975)	8, 23
<i>United States v. Paroutian</i> , 299 F.2d 486 (2d Cir. 1962)	15
<i>United States v. Percevault</i> , 490 F.2d 126 (2d Cir. 1974)	13
<i>United States v. Rauscher</i> , 119 U.S. 407 (1886)	18
<i>United States v. Russo</i> , 442 F.2d 498 (2d Cir. 1971), <i>cert. denied</i> , 404 U.S. 1023 (1972)	21, 22
<i>United States v. Santana</i> , 503 F.2d 710 (2d Cir. 1974), <i>cert. denied</i> , 419 U.S. 1053 (1974)	2, 3

	PAGE
<i>United States v. Sebastian</i> , 497 F.2d 1267 (2d Cir. 1974)	13
<i>United States v. Sisson</i> , 399 U.S. 267 (1970)	12
<i>United States v. Smith</i> , 464 F.2d 1129 (2d Cir.), cert. denied, 409 U.S. 1023 (1972)	21
<i>United States v. Super</i> , 492 F.2d 319 (2d Cir.), cert. denied, 419 U.S. 876 (1974)	23
<i>United States v. Torres</i> , 519 F.2d 723 (2d Cir. 1975), cert. denied, — U.S. — (1976)	23
<i>United States v. Vigo</i> , 487 F.2d 295 (2d Cir. 1973)	13
<i>Valentine v. United States ex rel. Neidecker</i> , 299 U.S. 5 (1936)	14
<i>Wilson v. Gerard</i> , 354 U.S. 524 (1957)	19

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1195

UNITED STATES OF AMERICA,

Appellant,

—v.—

ANTONIO FLORES,

Defendant-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States appeals pursuant to Title 18, United States Code, Section 3731, from a pre-trial oral decision rendered on April 19 and 22, 1976, by the Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, excluding certain evidence from Flores' forthcoming trial that the Court viewed as inadmissible under the terms of an Extradition Treaty.

Indictment 73 Cr. 19 was filed on January 8, 1973, in two counts, charging Antonio Flores and fifteen others with conspiring to import and distribute narcotics, approximately 600 pounds of heroin, in violation of Title 21, United States Code, Sections 173, 174 between Janu-

ary 1, 1968 and April 30, 1971.* At the time of filing of the indictment, Flores was a fugitive. In February, 1976, Flores was successfully extradited from Spain, where he had been arrested by the Spanish authorities in March, 1973, to the Southern District of New York. The Spanish order of extradition provided that he was to be prosecuted only for acts that occurred after September 3, 1970, which was the effective date of the applicable treaty of extradition, and before April 30, 1971, which was the date according to the indictment when the conspiracy terminated.** Flores has been in custody awaiting trial on this indictment since his arrival in New York.***

Prior to the date originally set for trial, Flores moved to suppress as evidence against him any evidence of the acts and declarations of the defendant or his conspirators made prior to the effective date of the treaty, September 3, 1970, or after the end of the conspiracy as alleged in the indictment, April 30, 1971. In a memorandum de-

* Three of the co-defendants proceeded to trial before Judge Bonsal in 1973, and were convicted. Their convictions were affirmed on appeal. *United States v. Santana*, 503 F.2d 710 (2d Cir.), cert. denied, 419 U.S. 1053 (1974). Others among the defendants have been acquitted or pleaded guilty, and still others remain fugitives. A superseding indictment, 73 Cr. 986, was filed on October 24, 1973. However, since Flores' extradition was sought on indictment 73 Cr. 19, he is being tried on that indictment.

** To the extent that they are relevant to this appeal, the details of Flores' extradition are included at pages 6-7 of this brief, *infra*.

*** Trial was originally scheduled to commence in April 1976—well within the 90 days of his arrival in the Southern District of New York required by the recently effective Speedy Trial Act. On several occasions prior to the trial date, Flores asked for a continuance (App. 70-100, 141-145). He subsequently made an explicit and formal waiver of his rights to a speedy trial under the Act. (App. 7, 94-95, 99).

cision dated March 24, 1976 and more explicitly at pre-trial conferences held on April 13, April 19, and April 22, 1976, the Court ruled that while statements made by Flores prior to September 3, 1970, would be admissible for the limited purpose of demonstrating Flores' knowledge and intent, statements and acts of co-conspirators prior to that date would be inadmissible. From this prospective preclusion of proof the Government appeals.

Statement of Facts

A. Factual description of the conspiracy

In order to understand the context of the Government's offer of proof and of the District Court's ruling, a brief recitation of the facts the Government anticipates will be presented at trial is necessary. A more complete and detailed offer of proof was made to Judge Bonsal (who stated that he was generally aware of them because he had presided at the trial of three of Flores' co-defendants in 1973) in the form of a memorandum of law, included in the separate Appendix filed in this appeal at pages 102-114.*

The conspiracy alleged in the indictment, and which the Government proposes to prove at trial, consisted principally of numerous shipments and agreements to ship large amounts of heroin from France to New York City between 1968, when the initial agreements were made, and April, 1971, by which date the principal con-

* The recitation of facts in this brief is based principally on the offer of proof made in the Government's memorandum of law. The facts also appear in this Court's opinion on the appeal following the earlier trial of these facts. See *United States v. Santana*, 503 F.2d 710, 711-713 (2d Cir.), cert. denied, 419 U.S. 1053 (1974).

spirators had been arrested. The principal source of the heroin in France was Edouard Rimbaud, together with several of his associates. The principal courier was Edmond Taillet; the principal purchaser in the United States was the defendant Antonio Flores. The other conspirators played lesser but still important roles in arranging or facilitating the flow of heroin.

The conspiracy began in 1968 when Rimbaud, living in France, wrote to a fellow Frenchman named Joseph Lucarotti, then serving a sentence in the Atlanta Federal Penitentiary. Through the ensuing correspondence, Rimbaud, who had a source to supply heroin in France, agreed to meet with a buyer provided by Lucarotti. In July, 1968, Rimbaud flew to Montreal and met Lillian Santana, the wife of Ralph Santana, who was a prison mate of Lucarotti in Atlanta.* Lillian Santana provided Rimbaud with \$16,000 for a first shipment of heroin, but Rimbaud's courier discarded the heroin on arriving in Montreal because he thought the police were watching him. As a result of this loss, Rimbaud was introduced by Lillian Santana to the American buyer, Antonio Flores.

Later in 1968 Flores flew to Paris to purchase heroin from Rimbaud to compensate for the heroin lost in Montreal, and shortly thereafter he purchased from Rimbaud two kilograms of heroin which were subsequently sent to New York City. Still later in 1968, Rimbaud met Taillet, a French entertainer, who agreed to act as a courier for Rimbaud's heroin. Beginning in January, 1969, Rimbaud managed to smuggle several

* Both Ralph and Lillian Santana were named as defendants in this indictment. Ralph was convicted after trial; Lillian pleaded guilty on August 27, 1975 to a superseding information, 75 Cr. 852.

shipments of heroin, of which the largest was 20 kilograms, to Flores in America. In February, 1969, Rimbaud was arrested in New York City,* and from that point on his role in the conspiracy was conducted from jail. While in jail in New York City, Rimbaud met Flores, who had also been arrested, and had several conversations in which Flores unsuccessfully attempted to determine the identity of Rimbaud's "connection" in France. Later in 1969, however, Rimbaud gave to Horacio Quinones, a lawyer hired for him by Flores, a letter of introduction to his heroin source in France.**

During the summer of 1969, Rimbaud's suppliers turned to Taillet to replace Rimbaud as a conduit to carry heroin to Flores in the United States. Taillet met Flores in Paris during the summer in 1969, and shortly thereafter met him again in New York, where Flores gave him \$150,000 to purchase heroin. Taillet then arranged for the delivery of a shipment of heroin to Flores. Later in 1969 he was introduced by Flores to Anthony Segura and was told by Flores that Segura would represent Flores' interests and receive future shipments of heroin for Flores. Between the autumn of 1969 and April, 1971, Taillet made seven trips to the United States to meet with Segura and, on some occasions, Flores; on three of those trips he delivered heroin to Segura for Flores, and on the remaining trips he received money from him. The heroin delivered in these transactions totalled more than 250 kilograms. Taillet was arrested in New York on April 29, 1971.

* A more complete discussion of the facts concerning the arrest appears in the opinion written on the appeal of a conspirator arrested with Rimbaud, see *United States v. Hysolion*, 439 F.2d 274 (2d Cir. 1971).

** Quinones was convicted after trial for his participation in this conspiracy.

At the first trial in this case, Rimbaud and Taillet, as well as two other lesser accomplices, testified for the Government.

B. Extradition proceedings in Spain

When Flores was indicted in January, 1973, he was a fugitive, having fled the United States in May, 1971, to France and then to Spain. On March 23, 1973, Flores was arrested in Barcelona, Spain, and was subsequently confined not only pursuant to the American extradition request but also for crimes he had committed on Spanish territory.*

Flores resisted extradition, and lengthy proceedings followed. On November 13, 1973, the High Court of Spain ruled that Flores be extradited.** However, the Court noted that while a bilateral extradition treaty between the United States and Spain existed since 1904, it did not include conspiracy to smuggle narcotics among the list of extraditable offenses until it was supplanted by the Convention for the Suppression of Illicit Traffic in Dangerous Drugs. This convention entered into force in Spain on September 3, 1970. Considering itself bound by concepts of international law to be discussed in more detail later in this brief, the Spanish High Court specifically stated in its decree "with respect to the charges brought against him [Flores] before the Court of the Southern District of New York, the extradition must be granted, but expressly limited to activities from September 3, 1970, to April 30, 1971, all previous activities

* These crimes were possession of a false passport and possession of drugs.

** An official State Department translation of that decree is included in the Appendix at pages 34-42.

being excluded." (App. 56). Following the issuance of the decree, the Embassy of the United States in Spain delivered to the Spanish government a formal Verbal Note reflecting the "specific assurance" of the United States Department of Justice that "... Antonio Flores [would] not be prosecuted in the United States of America for prior infractions or infractions different from those which are concretely referred to by the decision portion of the dictated decree . . ." (App. 43).

Flores remained in Spanish prisons serving out the sentence imposed by the Spanish courts until February 14, 1976, when he was flown from Spain to the Southern District of New York. Bail was then set at three million dollars by Judge Bonsal. Flores remains confined at the Metropolitan Correctional Center.

C. Proceedings in the Southern District of New York

On February 26, 1976, following Flores' return to and arraignment in the Southern District of New York, his counsel moved to preclude the United States from introducing the "[a]cts and declarations of the defendant and conspirators made prior to September 3, 1970 or after April 30, 1971 . . ." (emphasis added).^{*} The Government, in a response, conceded that it must prove a conspiracy including Flores during the period specified by the Spanish court, but contended that "At trial all of the evidence of the defendant's conspiratorial behavior [should be] admissible against him subject only to the limitation that the jury must find that all the

^{*} A copy of the defendant's Memorandum of law is included in the Appendix, pages 44-60.

necessary elements of the crime charged existed sometime during the period September 3, 1970 to April 30, 1971".*

In a Memorandum decision dated March 24, 1976, the District Court decided, as the Government had readily conceded, that the Government would have to prove

"that the conspiracy charged in the indictment was in existence between September 3, 1970 and April 30, 1971 and that the defendant was a member of it during that period."

The Court further said that

"the Government may introduce evidence of defendant's prior acts and conversations [prior to September 3, 1970] which may be relevant to defendant's knowledge and intent with respect to the Acts committed during this period [after September 3, 1970]."

(App. 67).

Although the District Court did not then mention whether the Government could also introduce the acts and statements of Flores' co-conspirators, the District Court had cited in its decision this Court's opinion in *United States v. Papadakis*, 510 F.2d 287, 295 (2d Cir. 1975), which expressly endorsed the use of prior criminal acts to prove a course of conduct circumstantially demonstrating a corrupt agreement, and the Government mistakenly, as it turned out, understood the Court to allow the Government to introduce proof of the entire conspiracy.

However, on April 13, 1976, at a pre-trial conference, the District Court said it would not permit the Govern-

* A copy of the Government's Memorandum is included in the Appendix, pages 61-64.

ment "to prove a long conspiracy going back to '68 and I am quite clear on that and I think I said so in my decision." (App. 85). With respect to the acts and statements made by co-conspirators on Flores' behalf, the Court did not see what "the activities of others on his behalf [had] to do with his [Flores'] knowledge and intent." (App. 87). Accordingly, the Government formally moved on April 19, 1976, to introduce evidence demonstrating the existence of the entire conspiracy from 1968 to April, 1971, including in particular statements and acts of co-conspirators prior to September 3, 1973.* During a pre-trial conference on that date, the District Court ruled that "the extradition treaty applies only to crimes committed after September 3, 1970." (App. 147). The Court dismissed out of hand the distinction, advanced by the Government, between "prosecution" for crimes committed before the effective date of the treaty and evidentiary use of those crimes to prove a conspiracy occurring after the effective date of the treaty. This Court said, "We are not talking about rules of evidence, they [the statements and acts of conspirators prior to September 3, 1970] are precluded by the treaty." (App. 16-17). The Court noted "I have had these [conspiracy] trials and I have allowed a lot of things in the way of background, but on this one I am faced with an extradition treaty which as I recall the conclusion is rather superior to all of these things," (App. 149-150), and "I think the law is clear along the lines that I said, and I said in view of the fact this is a treaty, I have to take a pretty strict construction. . ." (App. 153-154). The District Court said it "heard the evidence at the other trial" and wanted to be sure the jury was "not trying this whole conspiracy." (App. 167). Thus, the Court explicitly stated several times that it would restrict the

* A copy of the Government's memorandum is included in the Appendix at pages 101-130.

Government's proof concerning acts occurring prior to September 3, 1970 to "statements *the defendant made and his course of conduct*" devoted to "*his [Flores'] prior similar acts[s].*" (App. 151, 155, 157; emphasis added).

The Government was further instructed that when it put its witnesses on the stand they should begin their testimony only "when they first ran into Flores and [tell] how long they had known Flores and testify as to what Flores told them to do." (App. 163, 168, 148). The Court emphasized that it would preclude testimony of any other meeting or conversation of other conspirators, unless "Flores had [something] to do with that." (App. 163, 164). The Court, for example, ruled that although Flores' introduction of middleman Segura to French courier Taillet would be "admissible for the purpose of showing Flores' knowledge and intent at that time . . .", the Court would "not permit [proof of] all the acts that went on after that," that is, the ensuing heroin deliveries to Segura on behalf of Flores occurring prior to September 3, 1970. (App. 148-149). The Court characterized the deliveries to Segura as "a crime outside of the period of the indictment." (App. 149).

The District Court also ruled that it would not permit the Government to corroborate its witnesses with any testimony concerning events during which events Flores was not physically present. For example, in January, 1969, Flores travelled from New York to Montreal to pay his "French connection," Rimbaud, for heroin Rimbaud provided him. However, Taillet, rather than Rimbaud, carried the heroin in musical amplifiers from Paris to Montreal. In Montreal, Taillet met only with Rimbaud although Flores was in Montreal shortly thereafter. When the Government cited Taillet's prospective testimony describing his meeting with Rimbaud, the Court

made it clear that Taillet's testimony concerning Taillet's dealings with Rimbaud was inadmissible, stating, "[i]n the ordinary case that's just what happens, I agree with you, but here I am faced with a situation where that cannot happen." (App. 164).

The Court on numerous occasions counseled the Government to "go up to the Court of Appeals" (App. 147, 149, 153, 162, 169). Indeed, the District Court strongly urged the Government to do so, (App. 161), stating "the Court of Appeals may say I am wrong," (App. 154).

During further oral argument at a pre-trial conference held on April 22, 1976, the District Court reiterated that the Government's attempt to try Flores "on the same basis that they tried [codefendants] Santana and Quinones and Rivera and these other people about three years ago . . . go[es] beyond the treaty." (App. 182). In an effort to detail the precise items of proof that the District Court would follow and those it would bar, the Government presented to the Court and to counsel an affidavit containing a specific offer of 27 "items" the Government proposed to introduce at trial. (App. 172-178). The Court then indicated which items the Court would submit into evidence. While the Court declined to rule on certain items, despite the fervent urgings of the Assistant United States Attorney to do so, every item chosen by the Court for admission into evidence was either a statement or act of the defendant Flores prior to September 3, 1970. No item involving an act or statement of a co-conspirator absent Flores was held to be admissible. The District Court repeated "if you plan to have a rerun of the prior trial of which the record is available, with respect to Mr. Flores, I think you are going beyond the terms of the treaty. I have said that, and I won't say it again. I have said it very clearly." (App. 185).

The Government then filed the instant notice of appeal. At the request of the Government, the trial in this matter was stayed pending resolution of the appeal.

ARGUMENT

POINT I

There is clear statutory authority for the Government's appeal from the trial judge's pretrial decision to exclude evidence.

This Court unquestionably has jurisdiction over this appeal from the District Court's pretrial ruling excluding evidence to be adduced by the Government at trial. Title 18, United States Code, Section 3731, provides, in relevant part, that

"An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts *suppressing or excluding evidence* or requiring the return of seized property in a criminal proceeding, *not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information*, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

* * * * *

The provisions of this section shall be liberally construed to effectuate its purposes."*

* Section 3731, as presently in force, represents an attempt, through a 1971 amendment, to remedy the failures, see *United States v. Sisson*, 399 U.S. 267, 307-08 (1970), of the previous

[Footnote continued on following page]

Under section 3731 appeals lie not only from the more familiar pre-trial decisions suppressing items seized in contravention of the Fourth Amendment, see, e.g., *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975); *United States v. Vigo*, 487 F.2d 296 (2d Cir. 1973), but also from pre-trial discovery orders suppressing and excluding the anticipated trial testimony of prospective Government witnesses. See *United States v. Cannone*, 528 F.2d 296 (2d Cir. 1975); *United States v. Percerault*, 490 F.2d 126 (2d Cir. 1974); *United States v. Battisti*, 486 F.2d 961, 965-67 (6th Cir. 1973); *United States v. Calandra*, 455 F.2d 750, 752 (6th Cir. 1972), *reversed on other grounds*, 414 U.S. 338 (1974). See also *United States v. Sebastian*, 497 F.2d 1267 (2d Cir. 1974); cf. *Nixon v. Sirica*, 487 F.2d 700, 721 n.100 (D.C. Cir. 1973) (en banc). As the statement of facts in this brief shows, the ruling of the District Court at issue in this appeal barred the Government from introducing a large and highly significant part of its proposed evidence. Plainly, then, both the express language of section 3731 and the cases which have construed that section leave no doubt that this Court has jurisdiction to decide this appeal.

Criminal Appeals Act. The Senate Report, accompanying the 1971 amendments to the Act, clearly expresses Congress' intent to liberally foster pretrial Government appeals from decisions suppressing and excluding evidence:

"The Amended Criminal Act is intended to be liberally construed so as to effectuate its purpose of permitting the Government to appeal...from *all* suppressions and exclusions of evidence in criminal proceedings, except those ordered during trial of an indictment or information. S. 3132 [the 1970 amendment] places on the face of section 3731, an explicit expression of this intent, in view of the restrictive judicial interpretations of Congressional intent which have resulted from the histories of the earlier versions of section 3731 despite strong indications in the debate on the 1907 act that it should be broadly interpreted." S. Rep. No. 91-1296, 91st Cong., 2d Sess. 13 (1970) (emphasis added, footnotes omitted).

POINT II

The district judge erred in ruling that much of the conspiratorial activity which preceded the effective date of the Geneva Convention would have to be excluded.

The District Court's pretrial decision to exclude testimony concerning the acts and statements of Flores' co-conspirators occurring before September 3, 1970 (the date when the 1936 Geneva Convention became effective, is patently in error. The Court's decision proceeds from the mistaken premise that the fact that the Convention did not become effective until September 3, 1970 not only placed time limits on the crime for which Flores might be *prosecuted*, but also placed limits on *the evidence* which the Government might permissibly adduce in proving the commission of this crime. That this, plainly is incorrect is demonstrated (1) by the express language of the Convention—which was never even discussed by the District Court—and (2) by a settled body of law holding that when, because of a legally imposed time limitation, a criminal conspiracy becomes prosecutable only after it has commenced, it is perfectly permissible to adduce all proof of the conspiracy from its inception, so long as each of the elements of the offense is proven to have continued to exist during the prosecutable period.

A. The Geneva Convention does not require the exclusion of any evidence, nor does the decision of the Spanish court.

It is well settled that a treaty limits extradition to those crimes specifically enumerated in the treaty. *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936);

Green v. United States, 154 F. 401 (5th Cir.), *cert. denied*, 207 U.S. 596 (1907), and also under the "principle of specialty," that "the requisitioning state may not, without the permission of the asylum state, try or punish the fugitive for any crimes committed before the extradition, except the crimes for which he was extradited." Friedmann, Lissitzyn & Pugh, *International Law* 493 (1969). See, e.g., *Fiocconi v. Attorney General of the United States*, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972); *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962).*

No claim was made below, nor could one fairly have been made, that Flores was not properly extradited for his involvement in the narcotics conspiracy charged in the Indictment.

The 1936 Geneva Convention, which became effective in Spain on September 3, 1970, expressly provides for extradition for narcotics offenses and conspiracy to commit those offenses. (App. 24). Rather, the claim asserted below, and in large part accepted by the District Court, was that the extradition of Flores precluded the Government from proving the acts and statements of conspirators which occurred prior to the effective date of the treaty. The District Court ruled that to permit such proof would constitute a prosecution of Flores in violation of the Convention for a crime for which he had not been extradited, since the Spanish High Court had expressly limited Flores' extradition to "acts committed between September 3, 1970 [the effective date of the treaty] and April 30,

* Article IV of our 1904 Treaty with Spain, which the Spanish High Court recognized was impliedly amended by the 1936 Geneva Convention (App. 38), specifically incorporates this principle: "No person shall be tried for any crime of offense other than that for which he was surrendered . . ." (App. 15).

1971 [the date of termination of the conspiracy charged in the Indictment], excluding any previous or subsequent acts." (App. 41).

That the District Court incorrectly applied the Geneva Convention becomes abundantly clear when the Convention itself is examined. The Convention unequivocally reserves to the requisitioning State its own understanding of the term "prosecution" and its own evidentiary principles for the purposes of proving a crime after extradition has occurred. Article 15 of the Geneva Convention states:

"The present Convention does not affect the principle that offenses referred to in Articles 2 and 5 [the enumerated offenses including narcotics conspiracy] shall in each country be *defined, prosecuted and punished* in conformity with the general rules of its domestic law." (App. 27) (emphasis added)

Similarly Article 13 of the Convention, which sets forth the manner in which "letters of request" for extradition will be transmitted, provides in pertinent part that

"Nothing in the present Article shall be construed as an undertaking on the part of the High Contracting Parties to adopt in criminal matters any *form or methods of proof contrary to their laws.*" (App. 26) (emphasis added)

These articles, to which the District Court made not a single reference below, quite plainly conform with settled principles of conflicts law in providing that the law of a requisitioning State governs all questions con-

cerning the admissibility of evidence at the trial of an extradited defendant.*

Concededly, at first glance, certain language of the Spanish Court's decision may appear somewhat ambiguous on the question whether the Court intended simply to limit the acts for which Flores could be prosecuted, *i.e.*, tried and convicted, or whether it was intended to go still further and restrict the nature of the proof to be adduced at Flores' trial; however, the Convention itself provides an irrefutable answer to this interpretative question.** The Spanish Court expressly

* The Restatement 2d of Conflicts states that, as a general rule, the local law of the forum determines the admissibility of evidence. Restatement 2d of the Conflict of Laws § 138 (1971). The Reporter's comment goes on to state:

"Considerations of efficiency and convenience require that questions relating to the admissibility of evidence be determined by the local law of the forum. The trial judge must make most evidentiary decisions with dispatch if the trial is to proceed with reasonable celerity." *Id.* Reporter's comment a, at 384.

See also Leflar, *American Conflicts Law*, § 123 (1959). Although the Restatement is primarily concerned with civil, not criminal law, most principles expressed in the Restatement are applicable to criminal law. § 2. Further, the Restatement is intended to apply generally to cases involving not only "one or more states of the United States," but also one or more "foreign nations." § 10.

** The ambiguous language of Spanish Court includes the following statements:

"[W]ith respect to the charges brought against him before the Court of the Southern District of New York, the extradition must be granted, but expressly limited to activities from September 3, 1970 to April 30, 1971, all previous activities being excluded." (App. 38).

* * *

"[Extradition is] limited with respect to time to the acts committed between September 3, 1970 and April 30, 1971, excluding any previous or subsequent acts." (App. 41).

acknowledged that its decision was governed by the provisions of the Geneva Convention; indeed, it stated that the Convention was "an inescapable obligation of the [Spanish] courts." (App. 38) Articles 13 and 15 of the Convention could not possibly provide a clearer assurance that extraditions effected pursuant to this treaty would not effect the methods or manner of proof in the requisitioning state. In the face of these unequivocal treaty provisions, to interpret the decision of the Spanish Court in anything but perfect harmony with the Convention would be a disservice to the Spanish Government as well as to the spirit of international co-operation in the apprehension of narcotics traffickers embraced by the Convention.

Additional support for this interpretation of the Spanish Court's decision can be found in the very nature of extradition. Extradition effects the delivery of fugitives from justice from an asylum state to a requisitioning state for *prosecution* of particular offenses. *United States v. Rauscher*, 119 U.S. 407, 411 (1886). While the "principle of specialty" is a well accepted limitation on extradition, that principle merely restricts the requisitioning state to prosecution of those crimes for which the accused has been extradited and is "a privilege of the asylum state, designed to protect its dignity and interests, rather than a right granted to the accused." *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir. 1973). But while the principle of speciality places restrictions on the *crimes* for which a defendant may be prosecuted, no court to our knowledge—prior to the decision below—has ever suggested that international law would permit any asylum state to extradite a defendant and also place restrictions on the manner or nature of the requisitioning state's proof of the extradited offense. Such a gross interference with the sovereignty of the requisitioning state's

judicial system would fly in the face of settled principles of international law. See *Necley v. Henkel*, 180 U.S. 109, 122-23 (1901); cf. *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928-29 (2d Cir. 1974); *Gallina v. Fraser*, 278 F.2d 77 (2d Cir.), cert. denied, 364 U.S. 851 (1960).*

Indeed, the scrupulous care taken to preserve the unfettered integrity of local judicial system throughout the extradition process is demonstrated by the fact that when the United States, in its role as asylum state, is confronted with a question dealing with the admissibility of evidence at an extradition hearing, it draws exclusively from its own "local law." See *Collins v. Loisel*, 259 U.S. 309, 317 (1922); *Shapiro v. Ferrandina*, 478 F.2d 894, 900-05 (2d Cir. 1973).** Moreover, when a United States court grants an extradition request, it does not inquire into the requisitioning state's procedures. See *Wilson v. Girard*, 354 U.S. 524 (1957); *Holmes v. Laird*, 459 F.2d 1211, 1218-19 & 57 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972); *Gallina v. Fraser*, supra, 278 F.2d 77; *In re Ryan*, 360 F. Supp. 270, 274 (S.D.N.Y.), aff'd without opinion, 478 F.2d 1397 (2d Cir. 1973).

Finally, still further support for the conclusion that neither the Spanish court nor the framers of the

* That the interpretation which the District Court placed upon the Convention and the Spanish Court's decision reflected a drastic interference with our normal manner and mode of proof is perhaps best reflected by the fact that, although the District Court felt bound to exclude all acts and statements prior to September 3, 1970, the Court, in total disregard of its own rationale, went on to rule that acts and statements of Flores himself prior to that date would be admissible.

** Article 9(3) of the Geneva Convention states:

"Extradition shall be granted in conformity with the law of the country to which application is made."

Convention could possibly have intended to limit the proof which could lawfully be adduced to prove Flores' offense is found in our Government's verbal note which confirmed that we had agreed to prosecute Flores in conformity with the Spanish court's decision. That note, which fully satisfied the Spanish authorities that our Government had agreed to the conditions of extradition established by the Spanish court, provided in pertinent part that

"... Antonio Flores will not be *prosecuted* in the United States of America for prior infractions or infractions different from those which are concretely referred to by the decision portion of the dictated decree. . . (App. 43) (emphasis added).

The note was not, of course, directed to any questions concerning the evidence or the manner of proof to be used in the American prosecution of Flores.

B. United States law clearly permits proof of the conspiracy in its entirety.

Once it is recognized that the District Court was clearly mistaken in its interpretation of both the Geneva Convention and the Spanish Court's decision, it remains only to examine the settled body of law that clearly entitles the Government, in proving the continued existence of the conspiracy after September 3, 1970, to adduce proof of all prior conspiratorial acts and statements.*

* We note only at the outset our continued adherence to our position taken in the District Court that, while proof of the entire conspiracy is admissible at trial, the jury must be instructed that Flores can only be convicted if it finds that all the necessary elements of the crime existed between September 3, 1970, the date on which the Convention became effective, and April 30, 1971, the date on which the conspiracy is alleged to have terminated.

[Footnote continued on following page]

Decisions involving the *ex post facto* clause of the Constitution (Art. I, § 9, cl. 3) plainly demonstrate the admissibility of all conspiratorial acts and statements preceding the effective date of Spain's ratification of the Convention. The *ex post facto* clause prohibits prosecution under any law that makes criminal an act which was innocent when committed. See *Burgess v. Salmon*, 97 U.S. 381, 384 (1878); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). This constitutional proscription, however, is not violated when proof of conspiratorial conduct antedating the enactment of a statute is admitted as tending to prove either the continued existence of the conspiracy or the defendant's membership in it. See, e.g., *United States v. Fino*, 478 F.2d 35, 38 (2d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); *United States v. Smith*, 464 F.2d 1129, 1132-36 (2d Cir.), *cert. denied*, 409 U.S. 1023 (1972); *United States v. Ferrara*, 458 F.2d 868, 874-75 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972); *United States v. Binder*, 453 F.2d 805, 808 (2d Cir. 1971), *cert. denied*, 407 U.S. 920 (1972); *United States v. Russo*, 442 F.2d 498, 501 (2d Cir. 1971), *cert. denied*, 404 U.S. 1023 (1972).

As this Court noted in *United States v. Smith*, *supra*, 464 F.2d at 1133, a defendant against whom such proof is admitted is not prosecuted or punished for the conduct preceding the enactment—which otherwise would clearly be prohibited by the *ex post facto* clause; rather the prior acts and statements are admitted solely "to deter-

Of course, the Government will be obliged to prove at trial Flores' participation in the conspiracy by a "fair preponderance of the independent evidence" before the hearsay declarations of alleged co-conspirators is admissible against him. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub. nom. Lynch v. United States*, 397 U.S. 1028 (1970).

mine the existence and purpose of the conspiracy and to illumine the intent and purpose of the post-enactment behavior." See also *United States v. Fin*, *supra*, 478 F.2d at 38 (pre-enactment behavior admissible as "bearing on the existence and purpose of the conspiracy and the significance of later behavior"); *United States v. Ferrara*, *supra*, 458 F.2d at 874 (pre-enactment evidence admissible "to show the existence and purpose of the conspiracy, as well as to prove the intent and purpose of the conspirators' later acts"); *United States v. Binder*, *supra*, 453 F.2d at 808 (pre-enactment conduct admissible "to prove the existence and purpose of the conspiracy"); *United States v. Russo*, *supra* 442 F.2d at 501 (pre-enactment evidence admissible "in that it showed the intent and purpose of the conspirators' latter acts").*

Indeed, the admissibility of the conspiratorial acts and statements in the instant case follows *a fortiori* from those decisions involving the *ex post facto* clause. Here, unlike the situation in many of the *ex post facto* clause cases where the conspiratorial conduct antedating statutory enactment was lawful when committed, the conduct of Flores' co-conspirators was at all times proscribed by

* "Proof of the establishment of a conspiracy for the purpose of violating a law not yet in effect may be made, subject to and conditioned upon the making of proof that the conspiracy was adhered to, recognized and in effect reaffirmed, and its execution at least attempted after its objective became unlawful. Then, but only then, may the evidence of acts and admissions of each of the initial conspirators constitute evidence of an *unlawful* conspiracy against the other conspirators. It is no transgression of the rule forbidding the use of evidence of acts or admissions of one conspirator occurring before the conspiracy was formed or after it terminated against another conspirator, to admit evidence establishing an existing conspiracy to violate a law soon to be but not then in effect." *Christianson v. United States*, 226 F.2d 646, 653 (8th Cir. 1955), *cert. denied*, 350 U.S. 994 (1956).

United States law. In this circumstance, it is impossible to see any policy supporting the trial judge's decision to exclude this evidence.

Even more closely analogous to the present case are those decisions in which it has been held unequivocally that the Government may introduce proof of conspiratorial conduct that would otherwise be barred by the statute of limitations, so long as the conspiracy is shown to have continued into the permissible prosecutable period and at least one overt act in furtherance of the conspiracy is proved to have been committed during that period. See, e.g., *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957); *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).*

* Additionally, the acts and statements of co-conspirators prior to September 3, 1970 are also admissible as "prior criminal acts" insofar as they tend to establish the background and development of the conspiracy, including the relationship of the conspirators, *United States v. Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975); *United States v. Torres*, 519 F.2d 723, 727 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Super*, 492 F.2d 319, 323 (2d Cir. 1974); *United States v. Nathan*, 476 F.2d 456, 459-60 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States v. Colasurdo*, 453 F.2d 585, 591 & n.3 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). See also Fed. R. Evid. 404(b). The final paragraph of the District Court's memorandum of March 24, 1976 (App. 67) appears to reflect these principles in an obscure and incomplete manner. In that portion of the memorandum, the Court noted, relying on *United States v. Papadakis*, *supra*, that the Government could introduce statements and acts of Flores antedating the effective date of the Convention, but not those of his co-conspirators. Since the function of the prior similar acts in the above-mentioned case was to show the origin of the conspiracy and the relationship among the conspirators, this limitation makes no sense.

C. Conclusion

Finally, only a brief comment is necessary concerning the disastrous effects that the trial judge's ruling will have on the prosecution of this highly significant case. By excluding proof of co-conspirators' conduct prior to September 3, 1970, much of the testimony of the Government's witnesses concerning co-conspirator's conduct after that date will be wrenched from its proper context. As a result, the testimony will be at best incomprehensible to the jurors and at worst simply unbelievable.

For example, the Government cannot meaningfully explain the essential background to Flores' initial involvement in this conspiracy if it is precluded from showing that in 1968, Rimbaud, a French heroin dealer, wrote to Joseph Lucarotti, a prisoner then serving time in Atlanta Federal Penitentiary, to ask about possible buyers of heroin, and Lucarotti then arranged to have Rimbaud meet Lillian Santan, who provided Rimbaud with a first installment of \$16,000 in behalf of her then silent partner, Flores. Furthermore, the Government could not credibly demonstrate that the French sources of supply used Taillet as a courier for the heroin destined to Flores during the post-September 3, 1970 period if it cannot show that Taillet had carried heroin to Flores for Rimbaud prior to that date. As this Court has already noted with respect to these very facts,

"The core operators were Edouard Rimbaud, a French purveyor of narcotics, and Antonio Flores, an American buyer. Theirs was the continuing relationship from which the acts of the other conspirators derived their meaning and purpose. The Rimbaud-Flores conspiracy began in 1968. . . ." 503 F.2d at 712.

The unwarranted restriction that the lower court's ruling has placed on the Government's proof, if un-

remedied, will result in the exclusion of evidence that establishes (1) the origins of the unlawful enterprise; (2) the scope of the conspiratorial agreement; and (3) the nature and extent of each conspirator's participation. This restriction is totally unsupported by precedent or common sense, and is consistent with neither the Convention nor the legal principles underlying extradition procedures.

CONCLUSION

The ruling of the District Court should be reversed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JOHN P. FLANNERY, II,
FREDERICK T. DAVIS,
LAWRENCE R. PEDOWITZ,
*Assistant United States Attorneys,
Of Counsel.*

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

ss.:

ROSE HACHE, being duly sworn deposes and says she is employed as a Student Assistant in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York.

That on the 27th day of May, 1976, she did serve two copies of the brief hereto attached on Stuart Shaw, Esq., designated by Barry Asness, Esq., the attorney of record for defendant herein for the purposes of this appeal and for the trial below, whose offices are located at 345 Park Avenue, Borough of New York, City of New York, by handing two copies of same to Mr. Shaw in Courtroom 318 of the Courthouse.

Rose Hache
ROSE HACHE

Sworn to before me this

27th day of May, 1976.

Maria A. Morales
MARIA A. MORALES
NOTARY PUBLIC, State of New York
No. 31 - 4521851
Qualified in New York County
Term Expires March 30, 1978